

Special City Commission Meeting

City Hall, Commission Chambers, 3rd Floor, 1700 Convention Center Drive
July 26, 2006

Mayor David Dermer
Vice-Mayor Jerry Libbin
Commissioner Matti Herrera Bower
Commissioner Simon Cruz
Commissioner Luis R. Garcia, Jr.
Commissioner Saul Gross
Commissioner Richard L. Steinberg

City Manager Jorge M. Gonzalez
City Attorney Jose Smith
City Clerk Robert E. Parcher

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ATTENTION ALL LOBBYISTS

Chapter 2, Article VII, Division 3 of the City Code of Miami Beach entitled "Lobbyists" requires the registration of all lobbyists with the City Clerk prior to engaging in any lobbying activity with the City Commission, any City Board or Committee, or any personnel as defined in the subject Code sections. Copies of the City Code sections on lobbyists laws are available in the City Clerk's office. Questions regarding the provisions of the Ordinance should be directed to the Office of the City Attorney.

Call to Order - 6:00 p.m.

REGULAR AGENDA

R7 - Resolutions

- R7A A Resolution Approving A Settlement Agreement By And Between The City Of Miami Beach, Congress Group, Inc., And Ocean Drive CFI, LLC, Concerning Litigation Filed By The Prior Owners Of Property At 120 - 130 Ocean Drive, Miami Beach, Florida, And Authorizing The Mayor And City Clerk To Execute Such Agreement, And The Taking Of Necessary And Appropriate Steps For The Implementation Thereof.

(City Attorney's Office)

OFFICE OF THE CITY ATTORNEY

City of Miami Beach

F L O R I D A



JOSE SMITH
City Attorney

Telephone: (305) 673-7470
Facsimile: (305) 673-7002

SPECIAL COMMISSION MEETING MEMORANDUM

TO: Mayor David Dermer,
Members of the City Commission and
City Manager Jorge M. Gonzalez

DATE: July 26, 2006

FROM: Jose Smith
City Attorney

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA APPROVING A SETTLEMENT AGREEMENT BY AND BETWEEN THE CITY OF MIAMI BEACH, CONGRESS GROUP, INC., AND OCEAN DRIVE CFI, LLC, CONCERNING LITIGATION FILED BY THE PRIOR OWNERS OF PROPERTY AT 120 – 130 OCEAN DRIVE, MIAMI BEACH, FLORIDA AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE SUCH AGREEMENT, AND THE TAKING OF NECESSARY AND APPROPRIATE STEPS FOR THE IMPLEMENTATION THEREOF.**

The above referenced Resolution is submitted for consideration by the Mayor and City Commission for approval. The Resolution proposes a Settlement Agreement between the City of Miami Beach and Ocean Drive CFI, LLC, and Congress Group, Inc. (respectively, the owner of the property located at 120 -130 Ocean Drive, and the Developer of the project on said property). This Agreement will effectuate a dismissal with prejudice of all pending litigation and claims by the prior owner of 120 – 130 Ocean Drive, with exchanges of Releases between the affected parties.

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Agenda Item RTA
Date 7-26-06

1700 Convention Center Drive -- Fourth Floor -- Miami Beach

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA APPROVING A SETTLEMENT AGREEMENT BY AND BETWEEN THE CITY OF MIAMI BEACH, CONGRESS GROUP, INC., AND OCEAN DRIVE CFI, LLC, CONCERNING LITIGATION FILED BY THE PRIOR OWNERS OF PROPERTY AT 120 – 130 OCEAN DRIVE, MIAMI BEACH, FLORIDA, AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE SUCH AGREEMENT, AND THE TAKING OF NECESSARY AND APPROPRIATE STEPS FOR THE IMPLEMENTATION THEREOF.

WHEREAS, the City and the prior owners of property at 120 – 130 Ocean Drive, Miami Beach, Florida (“Property”) have been engaged in various lawsuits and claims which include, but are not limited to, actions taken with respect to the Property, which litigation and claims are more specifically described in the Settlement Agreement; and

WHEREAS, Ocean Drive CFI, LLC has purchased the Property, and Congress Group, Inc. and Ocean Drive CFI, LLC have acquired all of the prior owners’ interests in the lawsuits and claims and seek to resolve all of the pending lawsuits and claims with the City; and

WHEREAS, following discussions between the parties, the City Attorney’s Office and the Administration have considered a settlement offer by the Congress Group, Inc., and Ocean Drive CFI, LLC, and the parties have negotiated to resolve all disputes that may exist between them rather than continue with the litigation and the claims; and

WHEREAS, the settlement has been reduced to writing and is submitted simultaneously herewith for final approval by the Mayor and City Commission.

NOW, THEREFORE, BE IT DULY RESOLVED BY THE MAYOR AND THE CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the City Commission hereby approves the Settlement Agreement submitted herewith, and the Mayor and City Clerk are hereby authorized to execute such settlement Agreement on behalf of the City, and the City Manager and City Attorney are authorized to take such actions as are necessary or appropriate consistent with the intent of this Resolution to implement the provisions of the Settlement Agreement.

This Resolution shall take effect immediately upon its adoption.

PASSED and ADOPTED this ____ day of _____, 2006.

ATTEST:

MAYOR

CITY CLERK

APPROVED AS TO
FORM AND LANGUAGE
& FOR EXECUTION



CITY ATTORNEY

7/21/06

DATE

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the "Agreement") is made and entered into as of the ____ day of July, 2006, by and among: (1) the City of Miami Beach, a Florida municipal corporation (the "City"); (2) The Congress Group, Inc., a Massachusetts domestic profit corporation ("Congress"); and (3) Ocean Drive CFI, LLC, a Delaware limited liability company ("Ocean").

Introduction and Background

A. The Lawsuits and Claims. Micky Biss, individually, and USA Express, Inc., a Florida corporation (collectively referred to as "Biss"), have filed various lawsuits and claims against the City and its officials as more fully described on Exhibit "A" which is attached hereto and incorporated herein by reference (the "Lawsuits and Claims").

B. The Land and the Project. In general, the Lawsuits and Claims concern and relate to (i) those parcels of land (the "Land") located at 120 - 130 Ocean Drive within the City, all as more particularly described in Exhibit "B" attached hereto and incorporated herein by reference, and (ii) a project (the "Project") to be constructed on the Land under Building Permit No. B-9900085 (modified to B-0001810 and then to B-0101591) (the "Permit"), and as said Permit may be re-numbered and amended pursuant to modifications to the Project which may be approved pursuant to the terms of this Agreement and which, as to those set forth in the Final Schematic Design dated May 11, 2006 prepared by the architectural firm of Bermello, Ajamil & Partners, Inc. (the "Final Schematic Design"), has been reviewed by the City's Planning Director, and is acknowledged in the Modification Authorization to be consistent with the Permit.

C. Ocean's and Congress' Interests. On October 19, 2005, Ocean acquired fee simple title to the Lands pursuant to a Special Warranty Deed from Biss. Congress is the developer of the Project. Congress and Ocean represent that this Agreement is not inconsistent with any mortgage(s), assignment(s) of rents, or other security interest given between or among Ocean, Congress, and Biss.

D. Resolution of Disputed Matters. As evidenced by this Agreement, the Parties hereto desire to compromise, resolve, and fully settle any and all existing and potential claims and matters that are in dispute by and between them, including, but not limited to, those included in the Lawsuits and Claims, without the admission of liability by any party.

NOW, THEREFORE, in consideration of the mutual covenants and releases contained herein or incorporated herein by reference, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree to fully settle the Lawsuits and Claims on the terms and conditions set forth below:

1. Recitations. The foregoing recitations are true and correct and are incorporated herein by this reference.

2. Development Approvals.

(a) Conditions to Obligation.

(i) The obligations of Ocean and Congress under this Agreement are specifically conditioned upon the City and/or its departments acting in their independent, quasi-judicial, administrative, and/or legislative governmental capacity, as applicable, to consider and formally approve those certain governmental actions as more particularly described in Exhibit "C" attached hereto and incorporated herein by reference (the "Development Approvals," including the "Modification Authorization").

(ii) The Development Approvals shall be deemed approved at such time as the amended Permit becomes final and nonappealable and the validity of the amended Permit is upheld, if any appeal has been taken.

(iii) On or before the date that is six months from the full execution of this Agreement and the approval thereof by the City Commission and delivery to Ocean of the final and nonappealable Modification Authorization, Ocean shall submit plans required for the City to issue the amended Permit consistent with the Final Schematic Design. After the submission of such plans, the City may issue or deny the amended Permit, or provide written comments concerning the plans. If written comments are provided, Ocean shall initially have up to ninety days from receipt of such comments to respond. This process shall continue with Ocean having up to sixty days each time that it subsequently responds to written comments from the City until such time as the amended Permit is issued or denied. The review by the City's Building Department of the plans to be submitted by Ocean to the City shall be pursuant to the Florida Building Code and the Florida Fire Prevention Code, including all technical codes incorporated therein.

(b) Applications for Development Approvals. Congress and/or Ocean have initiated previously to the approval and execution of this Agreement, or will initiate subsequent to its execution, all of the Development Approval applications. The City is currently processing the Development Approval applications that have been submitted to it which are within its authority and jurisdiction. The parties shall cooperate with each other in continuing to timely submit all required documentation and to process all necessary Development Approvals from the City.

(c) Exercise of City Discretion. The parties recognize and agree that certain provisions of this Agreement will require the City and/or its boards, departments or agencies, acting in their governmental capacity, to consider certain governmental actions as set forth in this Agreement. All such considerations and actions shall be undertaken in accordance with established requirements of federal or state statutes and City or county ordinances, or other applicable law, in the exercise of the City's jurisdiction under its police power, as well as the requirements of this Agreement. Nothing in this Agreement is intended to limit or restrict the powers and responsibilities of the City in acting on applications for any of the Development Approvals by virtue of the fact that the City may have consented to the filing of such applications or by virtue of the City's entering into this Agreement. The parties recognize that

the City, and its boards and departments, retain sole discretion under their police powers as to whether to grant or deny the applications for Development Approvals. The parties fully recognize and agree that these proceedings shall be conducted openly, fully, freely, and fairly in full accordance with law and with both procedural and substantive due process.

3. Delivery of Modification Authorization; Dismissal of Lawsuits and Withdrawal of Claims with Prejudice; Exchange of Releases; Limited Hold Harmless. Within five (5) business days after the execution and delivery of this Agreement, the City shall deliver to Ocean the Modification Authorization. The parties acknowledge that the delivery of the Modification Authorization to Ocean is a condition precedent to this Agreement.

Within five (5) days after the City delivers to Ocean the Modification Authorization, Ocean and Congress agree that:

- (i) they shall not commence or pursue any other legal actions or claims against the City or the City Defendants with respect to the Lawsuits and Claims;
- (ii) they shall also suspend, or cause to be suspended, all of the Lawsuits and Claims and shall mutually cooperate with the City and the City Defendants to effect the stay and/or abatement of the Lawsuits and Claims until such time as the Development Approvals are obtained in accordance with Section 2(a)(ii) hereof. At the time Ocean is issued and receives an amended Permit and such amended Permit becomes final and nonappealable, and the validity of the amended Permit is upheld, if any appeal has been taken, Ocean and Congress shall cause to be dismissed with prejudice all of the Lawsuits and Claims. Ocean may substitute itself as a party plaintiff in the Lawsuits and Claims at any time;
- (iii) they shall deliver to Richard Ovelmen, Esq. those Notices of Voluntary Dismissal With Prejudice attached as Composite Exhibit "D" (the "Dismissals") executed by the respective plaintiffs, which are intended to dismiss with prejudice, subject to the satisfaction of the conditions set forth below, all of the Lawsuits and Claims. These Dismissals shall be held in escrow and shall not be effective or released to any party unless and until the conditions set forth in this Agreement have been satisfied, as more particularly set forth below, and
- (iv) they shall deliver to Richard Ovelmen, Esq. Releases attached as Composite Exhibit "E-1" and "E-2" executed by Micky Biss, USA Express, Inc., Ocean, and Congress and which are intended to release the City and City Defendants (as described in the Releases) from all claims which were raised or which could have been raised in the Lawsuit and Claims, subject to the satisfaction of the conditions set forth below and expressly subject to the execution and delivery to Ovelmen by the City and the City Defendants of the Releases attached as Composite Exhibit "F-1" and "F-2" executed by the City and the City Defendants.

The Dismissals and Releases shall be held in escrow by Ovelmen and shall not be effective or released to anyone unless and until Ocean is issued and receives the amended Permit in accordance with this Agreement and said amended Permit has become final and nonappealable and the validity of the amended Permit is upheld, if any appeal has been taken. Upon the amended Permit being deemed final and nonappealable, and the validity of the amended Permit is upheld, if any appeal has been taken, Ovelmen shall file or cause to be filed the Dismissals and deliver counterpart originals of the Releases to all parties and or signatories.

Ocean and Congress agree to hold harmless and indemnify the City from having to defend any action taken by Biss against the City after the execution of the Agreement and prior to the issuance of a final and nonappealable amended Permit to the extent that such action is inconsistent with (i) the stay of the Lawsuits and Claims, as provided above, and/or (ii) the issuance of the Development Approvals. This hold harmless and indemnity includes reasonable attorneys' fees and costs incurred by the City to defend any such action taken by Biss against the City; provided, however, that in the event such reasonable attorneys' fees and costs are recovered against Biss, they shall be reimbursed to Ocean and Congress.

4. Miscellaneous Provisions.

(a) No Permit. This Agreement is not and shall not be construed as a development permit, development approval, development order or authorization to commence development, nor shall it relieve Congress or Ocean of the obligations to obtain any development approvals that are required under applicable law and under and pursuant to the terms of this Agreement.

(b) Further Assurances. It is the intent and agreement of the parties that they shall cooperate with each other to effectuate the purposes and intent of, and to satisfy their obligations under, this Agreement in order to secure to themselves the mutual benefits created under this Agreement; and, in that regard, the parties shall execute such further documents as may be reasonably necessary to effectuate the provisions of this Agreement.

The parties agree to cooperate with each other so that Ocean may construct the building contemplated by the Final Schematic Design.

(c) Omissions. The parties hereto recognize and agree that the failure of this Agreement to address a particular permit, condition, term, or restriction shall not relieve Congress or Ocean of the necessity of complying with the law governing said permitting requirements, conditions, terms, or restrictions notwithstanding any such omission.

(d) Notices. Any notices required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been given if delivered by hand, sent by recognized overnight courier (such as Federal Express), or mailed by certified or registered mail, return receipt requested, in a postage prepaid envelope, and addressed as follows:

If to the City at:

City of Miami Beach
1700 Convention Center Drive
Miami Beach, Florida 33139
Attn.: City Manager

With a copy to:

City of Miami Beach
1700 Convention Center Drive
Miami Beach, Florida 33139
Attn.: City Attorney

If to Congress or Ocean:

The Congress Group, Inc.
33 Arch Street
Boston, Massachusetts 02110
Attn: Dean F. Stratouly

With a copy to:

Shubin & Bass
46 S.W. 1st Street, 3rd Floor
Miami, Florida 33130-1610
Attn.: John Shubin, Esquire

Notices personally delivered or sent by overnight courier shall be deemed given on the business date of delivery and notices mailed in accordance with the foregoing shall be deemed given three (3) days after deposit in the U.S. Mail.

(e) Construction.

(i) This Agreement shall be construed and governed in accordance with the laws of the State of Florida. All of the parties to this Agreement have participated fully in the negotiation and preparation hereof and, accordingly; this Agreement shall not be more strictly construed against any one of the parties hereto.

(ii) In construing this Agreement, the use of any gender shall include every other and all genders, and captions and section and paragraph headings shall be disregarded.

(iii) All of the exhibits attached to this Agreement are incorporated in, and made a part of, this Agreement.

(f) Time of Essence. Time shall be of the essence for each and every provision hereof.

(g) Entire Agreement. This Agreement, together with the documents referenced herein, constitute the entire agreement and understanding among the parties with respect to the subject matter hereof, and there are no other agreements, representations or

warranties other than as set forth herein. This Agreement may not be changed, altered or modified except by an instrument in writing signed by the party against whom enforcement of such change would be sought.

(h) Successors and Assigns; Third Party Beneficiaries. The benefits, rights, duties and obligations given to the parties under this Agreement shall inure to the benefit of and bind their successors in title and assigns. The parties acknowledge and agree that except only for the foregoing successors and assigns, there are no third party beneficiaries under this Agreement or the Exhibits attached hereto.

(i) Binding Agreement. The parties hereto understand and agree that this Agreement will not be binding on the parties to this Agreement until such time as the City Commission of the City of Miami Beach has approved same, and the Agreement is fully executed by the parties to the Agreement.

(j) Authority to Sign. Each of the signatories hereto represents that he or she has authority to execute this Agreement and to bind the party on whose behalf he or she has signed.

(k) Attorney's Fees and Costs. The parties shall each bear all of their respective attorney's fees and costs in the Lawsuits and Claims and in connection with this Agreement except as otherwise provided in the hold harmless and indemnity provision set forth in paragraph 3 above.

(l) Remedies and Reservation of Rights. In the event any party hereto fails or refuses to execute, cause to be executed, or deliver any of the Releases or Dismissals required hereunder, then the sole and exclusive remedies available to the non-defaulting party or parties for such failure or refusal shall be those available in equity, including without limitation, specific performance, injunction, and mandamus. In the event Ocean fails to timely respond to written comments from the City within the initial ninety day period or any of the successive sixty day periods set forth in subparagraph 2(a)(iii) above, the City shall provide written notice of such failure to Ocean and provide Ocean with fifteen business days within which to cure this failure by responding to written comments from the City. Ocean's failure to timely respond to the City's written comments within this fifteen business day cure period shall result in the Releases and Dismissals being released from escrow and becoming effective, with the City having the right to immediately file the Dismissals. The parties acknowledge that (i) the City's building official is not a party to this Agreement; and (ii) Ocean and Congress fully reserve all of their rights and remedies in connection with any decision or action of the City's building official concerning the Project, including, but not limited to, the issuance of the amended Permit. Prior to initiating any litigation under this Agreement, or under any of the Exhibits attached hereto, the party or parties desiring to initiate litigation will provide written notice to the other party or parties and shall be available for a period of 30 days after such written notice to attempt to meet and mediate the dispute prior to initiating litigation.

(m) Non-Admissibility. Actions taken by any of the parties hereto pursuant to or in furtherance of the provisions hereof shall not be admissible in any proceeding under the Lawsuits or Claims in the event the transactions contemplated hereunder are not consummated.

(n) Sovereign Immunity. Nothing in this Agreement or in the Exhibits attached hereto shall be deemed to be a waiver by the City of its rights and privileges under Florida Statutes Section 768.28 or Florida Statutes Section 70.001(13).

EXECUTED as of the date first above written in several counterparts, each of which shall be deemed an original, but all constituting only one agreement.

Signed, sealed and delivered
in the presence of:

CITY OF MIAMI BEACH, FLORIDA,
a municipal corporation

Attest:

City Clerk

By: _____

MAYOR

Signature

Print Name

THE CONGRESS GROUP, INC.,
A Massachusetts domestic
profit corporation

Signature

Print Name

By: _____

Dean F. Stratouly
President & Chief Executive Officer

Signature

Print Name

OCEAN DRIVE CFI, LLC,
a Delaware limited liability company

By: Congress Fund Management, LLC, its manager,

Signature

Print Name

By: _____
Dean Stratouly
Manager

Approved As To Form And Language
And For Execution.

City Attorney

Date: _____

EXHIBIT "A"

The Lawsuits

- 1.) Micky Biss and USA Express, Inc. v. David Dermer, Saul Gross, Richard Steinberg, Jose Smith, Matti Herrera Bower and Simon Cruz.
11th Jud. Cir. Ct. Case No. 06-5439 CA 22
- 2.) Micky Biss v. David Dermer, et al.,
11th Jud. Cir. Ct. Case No. 05-10178 CA 23
- 3.) Micky Biss v. City of Miami Beach and Robert Parcher, City Clerk of the City of Miami Beach.
11th Jud. Cir. Ct. Case No. 05-05755 CA 30
- 4.) Micky Biss and USA Express, Inc. v. City of Miami Beach.
11th Jud. Cir. Ct., Case No. 01-11865 CA 10

The Claims

- 5.) Harris Act Claims: Micky Biss (120 Ocean Drive) and USA Express, Inc. (126-130 Ocean Drive) (January 19, 1999, September 9, 1999, and August 14, 1996 claim letters)

EXHIBIT "B" – The Lands

Parcel 1:

Lots 4 and 5, less the East 15 feet thereof, in Block 2, of OCEAN BEACH, FLORIDA, according to the plat thereof as recorded in Plat Book 2, Page 38, of the Public Records of Miami-Dade County, Florida.

Tax Folio Nos.: 0242030030190 and 0242030030200

AND

Parcel 2:

Lot 6, less the East 15 feet thereof, in Block 2, of OCEAN BEACH, FLORIDA, according to the plat thereof as recorded in Plat Book 2, Page 38, of the Public Records of Miami-Dade County, Florida.

Tax Folio No.: 0242030030210

EXHIBIT "C" – Development Approvals

1. Written administrative approval of design and other modifications to the Permit by the City's Planning Director, which modifications are set forth in the Final Schematic Design (the "Modification Authorization"); and
2. Issuance of an amended Permit for the Project by the City's Building Department as necessitated by the approval in the Modification Authorization.

COMPOSITE EXHIBIT “D” – Notices of Voluntary Dismissal With Prejudice

(to be attached)

COMPOSITE EXHIBIT “E-1” and “E-2” - Releases

(to be attached)

COMPOSITE EXHIBIT “F-1” and “F-2” - Releases

(to be attached)



MIAMI BEACH

CITY OF MIAMI BEACH NOTICE OF A SPECIAL CITY COMMISSION MEETING

NOTICE IS HEREBY given that a Special Commission Meeting will be held by the City Commission of the City of Miami Beach, Florida, on **Wednesday, July 26, 2006, commencing at 6:00 P.M.**, in the Commission Chambers, 3rd floor, City Hall, 1700 Convention Center Drive, Miami Beach, Florida for the purpose of considering the possible settlement of litigation and claims that involve the development of property located at 120-130 Ocean Drive, and other issues, between the City and the owners, prior owners, and successors in interest of said property.

In addition, the City Commission may discuss other City business at this meeting.

Inquiries concerning this meeting should be directed to the City Attorney's Office at (305) 673-7470.

Robert E. Parcher, City Clerk
City of Miami Beach

Pursuant to Section 286.0105, Fla. Stat., the City hereby advises the public that: if a person decides to appeal any decision made by the City Commission with respect to any matter considered at its meeting or its hearing, such person must ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. This notice does not constitute consent by the City for the introduction or admission of otherwise inadmissible or irrelevant evidence, nor does it authorize challenges or appeals not otherwise allowed by law.

To request this material in accessible format, sign language interpreters, information on access for persons with disabilities, and/or any accommodation to review any document or participate in any city-sponsored proceeding, please contact (305) 604-2489 (voice), (305) 673-7218 (TTY) five days in advance to initiate your request. TTY users may also call 711 (Florida Relay Service).

Ad #383